Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: **June 8, 2018**

CLAIM NO. 201485068

JOHNNY LOGSDON PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

XTREME TRANSPORTATION
And HON GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Johnny Logsdon appeals from the January 8, 2018 Opinion, Award and Order and the February 13, 2018 Order rendered by Hon. Grant S. Roark, Administrative Law Judge ("ALJ"). The sole argument Logsdon raises on appeal is

whether the ALJ erred in excluding earnings from concurrent employment in the calculation of the average weekly wage ("AWW"). We affirm.

Logsdon alleged head and wrist injuries sustained in a fall on April 26, 2014, while employed by Xtreme Transportation. He worked part-time for Xtreme from 2012 through 2014. His work with Xtreme was on an as-needed basis, often occurring during prom and Derby seasons. Logsdon worked full-time as a truck driver for Mercury Logistics.

Logsdon testified that his supervisors at Mercury were aware of his employment with Xtreme. However, his testimony did not address whether Xtreme was aware of his employment with Mercury. At the final hearing, Logsdon submitted a June 5, 2014 letter from his attorney to Sedgwick CMS, a claims management service, requesting that wages from Mercury be included in the calculation of his temporary total disability ("TTD") benefits. He also submitted a wage verification from Mercury.

The ALJ determined Logsdon was an intermittent employee of Xtreme. In his highest quarter, he earned a total of $714.98, which, when divided by 13, yielded an AWW of $54.96. With respect to the disputed concurrent employment, the ALJ found no evidence establishing that Xtreme was aware

of Logsdon's employment with Mercury. As such, the ALJ excluded Mercury's wages from Logsdon's AWW. The ALJ awarded TTD benefits from April 27, 2014 through August 22, 2014 and permanent partial disability benefits at the rate of $.95 per week. He granted Xtreme credit for the overpayment of TTD against past due permanent partial disability benefits.

In a petition for reconsideration, Logsdon argued the ALJ improperly excluded his wages from his concurrent employment with Mercury. The ALJ denied the petition as a re-argument of the merits of the case. Logsdon now appeals, again challenging the ALJ's calculation of his AWW.

Logsdon notes Xtreme paid TTD benefits at the rate of $578.89 for 67.1823 weeks, a rate that clearly is not based solely upon his earnings with Xtreme. This rate, according to Logdson, is compelling evidence that Xtreme was aware of the concurrent employment with Mercury. Logsdon contends there is no rationale to explain the basis for Xtreme's payment of TTD benefits at that rate except that it was aware of the concurrent employment.

As the claimant in a workers' compensation proceeding, Logsdon had the burden of proving each of the essential elements of his cause of action, including his AWW. Snawder v. Stice, 576 S.W.2d 276 (Ky. App.

1979). Because he was unsuccessful in proving a higher AWW, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

When an employee is working under concurrent contracts with two or more employers, and the defendants employer has knowledge of the employment prior to the injury, the wages from all employers shall be considered as if earned from the employer liable for compensation. KRS 342.140(5). Here, the mere fact that the carrier paid TTD at a rate greatly exceeding that to which Logsdon would be entitled to, based upon his income from Xtreme, does not compel a finding that Xtreme was aware of Logsdon's employment with Mercury prior to the injury. Logsdon's testimony at the hearing only indicated that Mercury was aware of the concurrent employment with Xtreme.

Electronic records of the Department of Workers' Claims indicate the initial payment of TTD benefits was

$153.81, the minimum rate for a 2014 injury. Subsequent payments were made at the rate of $578.89 per week. Although Logsdon contends only one inference may be drawn from the rate of payment of TTD benefits, we disagree. Another possible inference is that the carrier adjusted the rate in response to the letter from Logsdon's attorney. If true, the payment would be based upon knowledge obtained after the injury. Nothing in the record establishes Xtreme had knowledge of the employment with Mercury prior to the injury. The inference advocated by Logsdon falls far short of compelling a finding in his favor.

Accordingly, the January 8, 2018 Opinion, Award and Order and the February 13, 2018 Order rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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